**Editor's note: 81 I.D. 30**

ESTATE OF ARTHUR C. W. BOWEN, DECEASED

AND SUPERIOR PERLITE MINES, INC.

IBLA 72-411 Decided January 22, 1974

Appeal from a decision of the Arizona State Office, Bureau of Land Management, rejecting mineral patent application AR 030706.

Reversed and remanded.

Mining Claims: Possessory Right

An assertion by a co-owner of a mining claim that his interest has been omitted in another co-owner's application for patent is not an adverse claim within the meaning of the pertinent statutes, 30 U.S.C. §§ 29-32.

Mining Claims: Possessory Right

In adverse proceedings between a placer claimant and a lode claimant, a state

court may only determine possession to that ground which is encompassed by both claims.

Mining Claims: Determination of Validity--Mining Claims: Possessory Right

While the judgment rendered by a state court as a result of adverse proceedings is binding on the parties with respect to possessory rights, the judgment will not bind the Department of the Interior with respect to determination of the validity of the claims or their nature as lode or placer since the Government was not a party to the proceedings.

APPEARANCES: Elmer C. Coker, Esq., Phoenix, Arizona, for appellants.

OPINION BY MR. STUEBING

The Estate of Arthur C. W. Bowen, deceased, and Superior Perlite Mines, Inc., Bowen's successor in interest, have appealed from a decision by the Arizona State Office, Bureau of Land Management, dated March 22, 1972, rejecting mineral patent application

AR 030706 for the reason that a state court had held that Bowen was not entitled to possession of the claims.

Bowen's patent application consists of four placer claims, the Superior Perlite Nos. 1, 2, 3, and 4. However, the first claims located in this area were four lode claims; two were located by Bowen and two were located by the predecessors in interest of the Sil-Flo Corp., 1/ the party asserting an adverse claim to Bowen's patent application. When these lode claims were located in 1944, it was the custom in this mining district to locate perlite as a lode deposit. Several years later substantial doubts had arisen as to whether perlite was more properly locatable as placer material. Consequently, many locators began covering their lode claims with placer claims in order to be able to comply with either the lode claim statute or the placer claim statute. 2/ In 1950 and 1954, Bowen and seven associates

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1/ Sil-Flo's two lode claims are the Elva F. No. 1 and Sandy No. 1. Bowen's lode claims are the David R. No. 1 and the Superior Perlite No. 1 which should not be confused with Bowen's Superior Perlite No. 1 placer claim. In order to avoid confusion, the lode claims will hereinafter be referred to as Sil-Flo's lode claims and Bowen's lode claims.

2/ The lode claim statute is 30 U.S.C. § 23 (1970), which describes a lode as "* * * veins or lodes of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits * * *." The placer claim statute is 30 U.S.C. § 35 (1970), and it describes a placer as anything other than a lode.

located the first two of the four placer claims in his application, the Superior Perlite Nos. 1 and 2, respectively. 3/ These two claims included within their boundaries all four of the previously located lode claims: the two belonging to Sil-Flo's predecessors in interest and the two belonging to Bowen.

Bowen and Sil-Flo entered into an agreement in 1954, by which Bowen conveyed to Sil-Flo the right to mine, remove and sell the perlite ore from Bowen's two lode claims in exchange for royalty payments and certain other obligations on the part of Sil-Flo. In 1955, a supplemental agreement was entered into extending the terms of the original grant to Bowen's placer claims then in existence, the Superior Perlite Nos. 1 and 2.

By 1960, Bowen had apparently become dissatisfied with the agreements and instituted an unlawful detainer action against Sil-Flo in the Arizona courts. A judgment was ultimately rendered in favor of Sil-Flo. Bowen v. Sil-Flo Corp., No. 117905 (Maricopa County, Ariz. Super. Ct., Apr. 17, 1961).

On June 5, 1961, Bowen filed an application for patent for four placer claims, the Superior Perlite Nos. 1 and 2 and two

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3/ Superior Perlite No. 2 was later amended to include more acreage. Still later, Bowen acquired the interests of his seven associates in all of the placer claims.

additional placer claims located in 1960 and 1961, the Superior Perlite Nos. 3 and 4, respectively. The application for patent was silent as to Sil-Flo's two lode claims, Sil-Flo's interest in Bowen's two lode claims, and Sil-Flo's interest in Bowen's Superior Perlite Nos. 1 and 2 placer claims.

Sil-Flo filed a timely adverse claim with the Arizona State Office and began proceedings in an Arizona Superior Court, asserting 1) its ownership of its two lode claims, 2) its interest in Bowen's two lode claims, and 3) its interest in two of Bowen's placer claims, the Superior Perlite Nos. 1 and 2. No adverse claim was filed by Sil-Flo with respect to Superior Perlite Nos. 3 and 4.

The Arizona Superior Court found that Sil-Flo was entitled to possession of its two lode claims and that Bowen was entitled to possession of his two lode claims. On appeal the Arizona Court of Appeals affirmed the judgment as to the lode claims, but modified it as to the placer claims by holding that, "* * * neither party established right to possession to areas outside of the four lode claims in question." Bowen v. Sil-Flo Corp., 9 Ariz. App. 268, 451 P.2d 626, 638 (1969).

Subsequent to the court proceedings, the successors in interest of both Sil-Flo and Bowen entered into a written

agreement which purported to divide the disputed property and waive any adverse claims.

On March 22, 1972, the Arizona State Office, Bureau of Land Management, without reference to the post-trial agreement of the parties rejected Bowen's entire application, relying on its interpretation of the Arizona Court of Appeals decision that neither party was entitled to possession of the placer claims. 4/

There are three basic issues presented on appeal: two dealing with the jurisdiction of the Arizona courts and one dealing with the effect, if any, to be given to the judgment of the Arizona courts.

The first jurisdictional issue concerns the scope of the Arizona court's final decree. The appellants have argued that since no adverse claim was filed as to Superior Perlite Nos. 3 and 4 placer claims, the Arizona courts had no jurisdiction to enter judgment with respect to those two claims.

After a close examination of the decision of the Arizona Court of Appeals 5/ we can find no indication that the Arizona

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4/ Interior Department regulations, 43 CFR 3862.1-1, 3863.1 require proof of possessory right before patent may issue.
5/ Bowen v. Sil-Flo Corp., supra.

courts ever intended to assume jurisdiction over Superior Perlite Nos. 3 and 4 placer claims. Indeed, those claims are not only not mentioned in the decision, but the Arizona Court of Appeals refers explicitly to a controversy concerning two placer claims 6/ and refers throughout the opinion to Superior Perlite Nos. 1 and 2.

It is apparent to us that because of the broad language used by the Arizona Court of Appeals in its modification of the Superior Court's decree, both the Arizona State Office, and the appellants have erroneously assumed that the decree was applicable to Superior Perlite Nos. 3 and 4. Therefore, that portion of the Arizona State Office decision rejecting Superior Perlite Nos. 3 and 4 placer claims is reversed.

The second jurisdictional issue involves the nature of the claims asserted by Sil-Flo in adverse proceedings with respect to Superior Perlite Nos. 1 and 2 placer claims.

The appellants argue that the Arizona courts had no jurisdiction over the area in those placer claims outside of the four lode claims, since the claims filed by Sil-Flo were not the kind of adverse claims contemplated by the statutes conferring jurisdiction

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6/ 451 P.2d at 627

on the state courts, 30 U.S.C. §§ 29-32. Those statutes provide in pertinent part:

> Where an adverse claim is filed during the period of publication, it shall * * * show the nature, boundaries, and extent of such adverse claim, and all proceedings * * * shall be stayed until the controversy shall have been settled or decided by a court of competent jurisdiction, or the adverse claim waived. [30 U.S.C. § 30.] (Emphasis added.)

> If, in any action brought pursuant to section 30 of this title, title to the ground in controversy shall not be established by either party * * * judgment shall be entered according to the verdict. In such case * * * the claimant shall not proceed in the land office or be entitled to a patent for the ground in controversy until he shall have perfected his title. [30 U.S.C. § 32.] (Emphasis added.)

The appellants argue that these statutes do not include those claiming through the title 7/ of the patent applicant or, as in this case, those claiming as co-owners. And, they argue, since the "adverse" claim filed by Sil-Flo was based on the 1954 and 1955 agreements between the parties, by which Bowen granted Sil-Flo an interest in his claims, the claim was not "adverse" within the meaning of the statute.

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7/ Title is used in this sense to mean right of possession against everyone except the Government. Fee title remains with the Government until issuance of a patent.

The appellants have correctly stated the principle of mining law that claims of co-owners are not adverse claims for the purposes of the relevant statute. This principle is well supported by Supreme Court opinion, Turner v. Sawyer, 150 U.S. 578 (1893), departmental decision, Thomas v. Elling, 25 L.D. 495 (1897), and departmental regulation, 43 CFR 3872.1.

In mining law, the source of title is a location supported, inter alia, by a mineral discovery. Where there is no conflict between different locations (or sources of title) there is no adverse claim. Turner v. Sawyer, supra. Therefore, while the Arizona Court of Appeals clearly had jurisdiction to determine possession to the lode claims and that area of the placer claims contained therein, it did not have jurisdiction to determine the possession of any area outside the lode claims, since there is only one source of title to that area of the placer claims, and consequently there can be no adverse claim of the sort contemplated by 30 U.S.C. § 30 (1970). 8/

There remains to be considered the question of the effect of the judgments of the Arizona courts with respect to whether perlite is locatable as a lode or placer. It was necessary for

8/ It should be emphasized that the lode claims held by Sil-Flo in its own right were "adverse claims" to the placer claims asserted by Bowen within the purview of 30 U.S.C. § 30, and the court properly recognized its jurisdiction under the statute as to the conflict between these claims.

the Arizona courts to decide that issue in order to determine possession. While the finding of the Arizona courts on this issue is binding on the adverse parties with respect to possession, it is not binding on the Government with respect to the determination of the validity of the claims since the Government was not a party to the litigation. In this regard the Supreme Court has stated:

> It must be remembered that it is "the question of the right of possession" which is to be determined by the courts, and that the United States is not a party to the proceedings. The only jurisdiction which the courts have is of a controversy between individual claimants, and it has not been provided that the rights of an applicant for public lands as against the government may be determined by the courts against the latter. [Perego v. Dodge, 163 U.S. 160, 168 (1896).]

See Best v. Humboldt Placer Mining Co., 371 U.S. 334, 336-337 (1963); Clipper Mining Co. v. Eli Mining and Land Co., 194 U.S. 220, 234 (1904); Bowen v. Chemi-Cote Perlite Corporation, 102 Ariz. 423; 432 P.2d 435, 443 (1967); Bowen v. Sil-Flo Corp., supra; Alice Placer Mine, 4 L.D. 314, 317 (1886); Chemi-Cote Perlite Corp. v. Bowen, 72 I.D. 403, 408 (1965); Ethelyndal McMullin, 62 I.D. 395, 399-400 (1955).

Even so, the Department may properly accept and follow the judgment of a court of competent jurisdiction, determining as

between contending parties their respective rights to, and interests in, the land in controversy. Thomas v. Elling, supra, 498. This would necessarily involve an independent determination by an appropriate officer of the Department that the judgment expressed the correct result.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is reversed and the case remanded to the Arizona State Office for further consideration.

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Edward W. Stuebing, Member

We concur:

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Douglas E. Henriques, Member

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Martin Ritvo, Member